

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3557 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

MANJI VISHRAM BHUVA

Versus

V KRISHNAMURTHY

Appearance:

MR AR THACKER for Petitioner

MR SUNIL C PATEL for Respondent No. 3

MR KC SHAH, A.G.P., for Respondent Nos.1,2 & 4

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 13/09/96

ORAL JUDGEMENT

In this petition under Article 226 of the Constitution of India the petitioner - Manji Vishram Bhuva has brought under challenge his continued detention as well as detention order dated 20-1-1996 rendered by the respondent no.1 under Section 3 (1) of the Conservation of Foreign Exchange and Prevention of

Smuggling Activities Act, 1974 (for short 'COFEPOSA Act').

2. The grounds of detention appearing at Annexure-B inter-alia indicate the following allegations of facts.

The Custom Officer of Bhuj received information regarding the petitioner smuggling gold biscuits from Muscat to India while arriving from Muscat to Bhuj via Ahmedabad on or around 28-12-1994. While the petitioner and his two sons were going from Bhuj Airport in 118 NE Car bearing No.GJ-1-K-3917 they were intercepted and brought to the Custom Office, Bhuj. On personal search 14 gold biscuits of 10 'tolas' each wrapped in the carbon papers were found concealed in the Chappals worn by the petitioner's son and on search of the packet wrapped in the handkerchief which was given by the petitioner to his son 3 gold biscuits of 10 'tolas' each and one gold chain of 24 carats weighing 116.00 grams were found. Thus, 17 gold biscuits of 10 'tolas' each and one gold chain in all of value of Rs.9,89,584/- were found to have been smuggled from Muscat to India. The Custom Officer, Bhuj, seized the said gold articles on reasonable belief that the gold was smuggled into India and was liable for confiscation under the relevant provisions of the Customs Act, 1962. On interrogation it was further revealed that there was smuggling of around 20 gold biscuits from Muscat to India on 11-11-1994. On search of the residential premises of the petitioner three pairs of shoes having cavities in the heel for concealing the smuggled gold were found. In view of these facts satisfaction was rendered to the effect that the gold which was seized in the case was smuggled.

3. Reference has been made before the Detaining Authority and the Detaining Authority after considering the entire material placed before him and all aspects of the case has come to the conclusion that continuance of the petitioner's prejudicial activities was likely if he was left free. The Detaining Authority has asserted that he was aware of the fact that the petitioner was released on bail. But bearing in mind likelihood of petitioner's continued prejudicial activities he felt satisfied that it was necessary to detain the petitioner. It was also considered that prosecution would take considerable time as number of witnesses would have been examined and therefore it was found that the present detention under the COFEPOSA Act was the only remedy at that stage.

4. The Detaining Authority has referred passage of time in the grounds of detention in this manner.

"I have examined the time gap between the date of incident and passing of detention order against you and I am satisfied that there is no delay in initiating action under the 'COFEPOSA Act' against you and that the nexus between the date of incident and the passing of this detention order as well as object of your detention has been maintained."

5. The petitioner has challenged the aforesaid detention order and his continued detention on the ground of delay. It is not in dispute that the incident took place on or around 28-12-1994. It is also not in dispute that the petitioner was arrested on the same day and was bailed out on 5-1-1995. The order of detention has been passed on 20-1-1996. Therefore, there is a gap of more than a year in between.

6. Explaining this delay the State Government has stated that the sponsoring authority ought to have been joined so as to enable the said authority to explain delay on its part and COFEPOSA Section of the Home Department received a proposal to detain the petitioner and two others on 28-6-1995 i.e. after passage of more than six months. Certain information/documents were received from the Sponsoring Authority as per the letter dated 14-7-1995 and as per letter dated 17-10-1995. However further information/details were called from the Customs, Ahmedabad on 28-10-1995. After such information was received and scrutinized a note was prepared by the COFEPOSA Section of the Home Department on 3-11-1995 and the said note was put up to the Under Secretary of the Home Department. Certain information having been received, and after discussion, the file was cleared on 14-11-1995 and was put up to the Deputy Secretary who cleared the file on 22-11-1995. It was put up to the Additional Chief Secretary (Home) who is the Detaining Authority and the meeting was held between the Detaining Authority and the Commissioner of Customs (Prev.) Ahmedabad on 18-12-1995 and then on 28-12-1995 and thereafter a note was prepared and put to the Deputy Secretary who cleared the file on 4-1-1996 and the file was put up before the Detaining Authority. After going through the file the Detaining Authority passed the impugned order of detention against the petitioner as abetor and other two persons on 18-1-1996 and finally issued the order with the grounds on 20-1-1996. It has been further stated that there were in all 55 (fifty five) public holidays between 28-6-1995 and 20-1-1996 and the Detaining Authority was required to consider further

two proposals under the COFEPOSA Act and one proposal under the PITNDPS Act, 1988 and the proposals were considered and orders of detention were passed on 29-6-1995, 11-7-1995, 26-9-1995 and 28-9-1995 and in so far as left out proposal is concerned on 20-1-1996.

7. Mr. Sunil C. Patel, learned Additional Standing Central Government Counsel has fairly conceded that in the affidavit-in-reply filed on behalf of the Central Government, delay on the part of the Sponsoring Authority has remained unexplained. He has however submitted the chart of the Sponsoring Authority, which reads as under:-

"01. The Gold was seized on 28-12-94 and follow-up action and investigation was carried out.

02. Assistant Collector, Bhuj sent the set of relevant document along with translation vide his letter dtd. 1-3-95.

03. The material was scrutinised in COFEPOSA section and put up before C.C. (P) on 13/3/95. The C.C.(P) approved the case and directed to put up before Screening Committee.

04. Certain queries were raised and called for additional information on 13-3-95 which was answered and sent by A.C. Bhuj on 29-3-95.

05. The material relating to the case was circulated to the members of Screening Committee which held its meeting on 15-4-95.

06. Thereafter, the work relating to translating documents and preparing sets were taken up as it was noticed that faithful and complete translation was not sent.

07. Certain additional documents were sent by A.C. Bhuj, vide his letter dtd. 17-4-95 and 31-5-95.

08. In the meanwhile, the COFEPOSA section also processed other detention proposals in respect of two different cases cleared by the Screening Committee on 15-4-95 and forwarded the detention proposal to the State Govt. on 1-5-95 and 19-5-95.

09. The COFEPOSA section also dealt with other important work like writ petition, representation, Advisory Board and correspondence in connection with pending proposals which consumed considerable time.

10. It will also not be out of place to mention that the photocopier machine of this office was out of order for considerable time, many dealing officers were also on leave etc. and this office being Central Govt. office function on five days basis.

11. The sets of documents were scrutinised in COFEPOSA section and material relating to the persons concerned were prepared.

12. The proposal for detention is forwarded to the State Govt. on

It can be seen from the forgoing that the
subject seizure case was under active
consideration right from the date of
incidence. The nexus between the date of
incidence and date of forwarding proposal
as well as the object of preventive
detention has maintained. Thus, there is
no delay initiating detention proposal in
respect of the person involved in the
cases."

8. On going through the said chart I find that there are certain phases of time which have remained unexplained, e.g. for the first time relevant documents along with translations were sent as per letter dated 1-3-95 and then reference has been made to the tossing of the matter from one department/section to the another department/section without explaining the period during each phase of time.

9. In the back ground of the aforesaid facts, this matter has to be examined. On behalf of the petitioner reliance has been placed on a decision of the Apex Court in the case of Pradeep Nilkanth Paturkar Vs. Ramamurthi and others (AIR 1994 SUPREME COURT 656). In that case, the detention order under Section 3 (1) of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drugs Offenders Act (55 of 1981) passed, on the basis of the criminal cases registered against the detenu and also on the basis of the statements of the witnesses was passed after 5 months and 8 days from registration of last case and more than 4 months from the submission of the proposal for the said order. The said order was set aside by the Supreme Court on the ground of delay. Reference was made to the following dictum appearing in the case of T.A. Abdul Rahman V. State of Kerala (1989) 4 SCC 741 : (AIR 1990

"The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live-link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the Court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the Court has to investigate whether the causal connection has been broken in the circumstances of each case."

10. Reference has also been made in the above case to one more decision in the case of Hemlata Kantilal Shah V. State of Maharashtra (1981) 4 SCC 647 : (AIR 1982 SC 8). There following observations appearing at page 13 of AIR were reproduced :-

"Delay ipso fact in passing an order of detention after an incident is not fatal to the detention of a person, for, in certain cases delay may be unavoidable and reasonable. What is required by law is that the delay must be satisfactorily explained by the detaining authority."

11. Now, in the matter in hand, it may noted from the aforesaid facts with regard to delay that certain phases of the period have remained unexplained. Merely transmission of the files from one department to another would not go to explain whole of the period particularly when delay is as long as one year after the petitioner was enlarged on bail in the case in respect of the incident in question. Taking into consideration unexplained delay regarding various phases of time which have been set out by the respondents continued detention of the petitioner deserve to be snapped. This is more so because live link between the prejudicial activities of

the detenu necessitating his detention and purpose of his detention would stand snapped on account of undue and long delay between the prejudicial activities and passing of detention order. It is not the case of the respondent that after the petitioner was enlarged on bail he had indulged in the objectionable activities. It has also to be noted that declaration u/s.9(1) of the Cofeposa has not been made and total period of detention can not exceed 12 months whereas 8 months have already passed.

12. Mr. Sunil C. Patel, learned Additional Central Government Standing Counsel has referred to a decision of this Court in the case of Harish Anand V/s. Union of India & Ors. reported in 1996 (1) G.L.H. 234. On going through the decision of this Court (Harish Anand's case, supra) I find that the same will not be applicable to the facts of the present case. Distinguishable feature of the present case may be noted from the explanation referred to hereinabove with regard to the passage of time at different stages as noted hereinabove in the context of the nature of the activities, enlargement of the petitioner on bail as back as on 5-1-1995 and non-occurrence of any incident in between the petitioner's enlargement on bail and the date of detention of the petitioner. It has also to be noted that the order of bail has been challenged before this Court and till the date of order of detention and even till this date no effort has been made to show that such challenge has succeeded or failed. It is stated at the bar by Mr. Thakkar that the petition challenging the bail order is still pending and there is no effort on the part of the respondents to have it heard and decided. In Harish Anand's case reference has been made to number of decisions, one of which is contained in the case of Rajendra Kumar Natvarlal Shah V. State of Gujarat, reported in AIR 1988 SC 1255. It is no doubt true that the distinction has to be drawn between the delay in making detention order under a law relating to preventive detention like the COFEPOSA and the delay in complying with the procedural safeguards of Article 22 (5) of the Constitution. It is also no doubt true that in the enforcement of such law there is apt to be some delay between the prejudicial activities complained of u/s 3(1) of the COFEPOSA and the making of an order of detention. It is also no doubt true that investigation and prosecution of the offences relating to smuggling and/or foreign exchange racketeering, would consume considerable time. At the same time basic principle is that live link between the prejudicial activities of the detenu and the purpose of his detention would have to be maintained. It has also to be borne in mind that detention is a serious

invasion of personal liberty and the normal methods open to a person charged with commission of any offence to disprove the charge or to prove his innocence at the trial are not available to the person preventively detained and therefore, in preventive detention jurisprudence whatever little safeguards the Constitution and the enactment authorising such detention provide assume utmost importance and must be strictly adhered to. (See Ibrahim Ahmad V. State of Gujarat - AIR 1982 SC 1500). Hence, in the peculiar facts and circumstances of the present case and in particular those noted hereinabove, Harish Anand's case will not be applicable.

13. There are other grounds to challenge the impugned order of detention. However, since the petitioner would succeed on the ground of delay it would not be necessary to deal with the same.

14. In the facts of the case, therefore the order of continued detention of the petitioner will have to be held illegal. Hence, following order is passed :

Continued detention of the petitioner Manji Vishram Bhuvra under the impugned order of detention is hereby held to be illegal. He is therefore, directed to be set at liberty forthwith if not required to be detained in any other case. Rule is made absolute accordingly.